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No. 75-307

In the Supreme Court of the United States

OCTOBER TERM, 1975

FRANK J. KUTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that (1) the evidence is insufficient to sustain his conviction under the Hobbs Act; (2) the district court erred in its instruction to the jury on an element of the Hobbs Act offense (affect on commerce); (3) the district court erred in denying his motion to quash a subpoena for financial records of a partnership; and (4) aspects of the government's closing argument denied him a fair trial.

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted for extortion under color of official right, in violation of the Hobbs Act, 18 U.S.C. 1951(a), (b)(2)[1] (count 2) and making a false statement on his federal income tax return, in violation of 26 U.S.C. 7206(1) (count 9).[2] He was sentenced to concurrent terms of six months' imprisonment (Pet. 6). The court of appeals affirmed (Pet. App. A). A petition for rehearing *en banc* was denied (Pet. App. B).

The evidence at trial showed that petitioner was a ward alderman in Chicago and a member of Chicago's City Council. He is also an attorney. Sometime before July 1969, petitioner was contacted by Sam Vanchieri, a realtor and an acquaintance, about approving a zoning change in petitioner's ward which Mr. Vanchieri was considering submitting to the City

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[1] That section provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by * * * extortion * * * shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, * * * under color of official right.
>
> * * * * *

[2] The indictment contained 10 counts; petitioner was acquitted on all but counts 2 and 9 (Pet. App. 1-2).

Council with respect to some of his property. Petitioner told Mr. Vanchieri that he had no objection to the proposed change. Mr. Vanchieri subsequently filed the zoning application, which was passed by the full City Council on November 17, 1969. Petitioner voted in favor of the amendment (Pet. App. 3).[3]

On December 1, 1969, petitioner telephoned Mr. Vanchieri and asked to see him. Though no money had been mentioned by either man up to this point, Mr. Vanchieri brought a blank check with him to petitioner's office. Thinking that he "owed [petitioner] something for not objecting to the zoning" (Tr. 140-141), Mr. Vanchieri initiated his meeting with petitioner by asking how much he owed. In response, petitioner said "$1500." Mr. Vanchieri made out the blank check for that amount, payable to himself; he then endorsed it, gave it to petitioner, and left the office (Pet. App. 3).

As a result of the zoning change, Mr. Vanchieri constructed three buildings on the newly zoned lots using materials transported in interstate commerce (Pet. App. 4).

1. Petitioner contends that his conviction for violation of the Hobbs Act cannot stand because the evidence was insufficient to establish the necessary elements of extortion and interference with commerce

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[3] While an alderman in the City of Chicago, as a member of the City Council, plays only a peripheral role in a change in zoning ordinances (Tr. 20-25; 1613-1615), there was testimony of numerous instances in which those seeking rezoning paid money to the ward alderman (see Tr. 369-370, 373-374, 461, 752-753, 771, 1078-1083).

(Pet. 8). See *Stirone* v. *United States*, 361 U.S. 212, 218. But the evidence here is clearly sufficient to permit the jury to find both elements. The term "extortion" as used in 18 U.S.C. 1951(a) is defined as "the obtaining of property from another, with his consent, * * * under color of official right" (18 U.S.C. 1951 (b)(2)). Mr. Vanchieri solicited the help of petitioner in his capacity as ward alderman and city councilor; petitioner helped Mr. Vanchieri in his official capacity and was thereafter paid by Mr. Vanchieri, who believed he owed petitioner for his help. This evidence was sufficient for the jury to find that "it was [petitioner's] office that brought forth Vanchieri's payment" (Pet. App. 4). See *United States* v. *Braasch*, 505 F. 2d 139, 151 (C.A. 7), certiorari denied, 421 U.S. 910.

There is no question that the rezoning affected interstate commerce (see Pet. 13), but petitioner contends the evidence was insufficient to show that the rezoning (and therefore the affect on commerce) was procured by the extortion. Though there is no evidence of money being discussed before the zoning amendment passed, or of an explicit agreement, the evidence supports an inference that petitioner and Mr. Vanchieri had a tacit agreement in which Mr. Vanchieri would be expected to pay for petitioner's acquiesence. The two men met and discussed the proposed zoning change. Mr. Vanchieri testified that he anticipated having to make a payment to insure that his proposal would be adopted. When he asked petitioner how much he owed, petitioner named his

price. Petitioner accepted the payment without hesitation and, by so doing, obtained property not due him or his office under color of official right. As in conspiracy cases, an agreement need not be shown by the explicit admissions of the principals involved; "common purpose and plan may be inferred upon a 'development and collocation of circumstances.'" *Glasser* v. *United States*, 315 U.S. 60, 80. Since the evidence showed that petitioner and Mr. Vanchieri tacitly reached a common understanding, the court of appeals was correct in holding that the evidence in this case was sufficient for the jury to find that petitioner had violated the Hobbs Act (Pet. App. 5-6).

2. Petitioner contends that the district court erred by instructing the jury that commerce was affected as a matter of law if it found that certain facts had occurred, because, he argues, it is the jury's function to determine whether interstate commerce is affected, and the effect of the instruction was impermissibly to direct a verdict on that issue (Pet. 15-17).[4] The

[4] The instruction read in pertinent part (Tr. 2155-2158):

> In reference to the statutory requirement of the law that commerce be affected, you are instructed as a matter of law that there was such an effect on interstate commerce and the necessary Federal jurisdictional element is satisfied if you find beyond a reasonable doubt that materials used in the construction or furnishing of buildings constructed in 1970 at 5316, 5318 and 5322 South Kilbourn Avenue, Chicago, Illinois, were manufactured or shipped from outside the State of Illinois, and that the buildings which were built on that Kilbourn Avenue property could not have been built under the pre-existing zoning ordinance.

courts of appeals, however, have uniformly held that while it is for the jury to determine if the alleged facts have been proven, it is for the courts to determine whether those facts meet the statutory requirement of affecting commerce. See *United States* v. *Hyde*, 448 F. 2d 815, 839 (C.A. 5), certiorari denied, 404 U.S. 1058;[5] *Nick* v. *United States*, 122 F. 2d 660, 673 (C.A. 8); *United States* v. *Green*, 246 F. 2d 155 (C.A. 7), certiorari denied, 355 U.S. 871.

Petitioner confuses the distinction between questions of fact and questions of law. The cases he cites (Pet. 17),[6] as the court of appeals correctly pointed out (Pet. App. 7), dealt with instructions that preempted jury determinations of factual issues. That is not the case here. The court left all factual issues for the jury but properly kept as a question of law the

[5] In *Hyde* the court of appeals stated (448 F.2d at 839, 841; footnote omitted):

> All of the Hobbs Act cases agree that the court should determine whether the facts alleged meet the statutory requirement of affecting interstate commerce. * * * This approach is used rather than telling the jury in general terms what it means to affect commerce and allowing the jury to determine whether the facts meet this criterion, because this is a jurisdictional element for which the court has a great responsibility. It is for the jury to determine whether the facts have been proved, that is, *whether they believe the evidence* with respect to the factual elements of the indictment as explained in the charge. [Emphasis in original.]

[6] *United States* v. *Skinner*, 437 F. 2d 164 (C.A. 5); *Mims* v. *United States*, 375 F. 2d 135 (C.A. 5); *United States* v. *Raub*, 177 F. 2d 312 (C.A. 7); *United States* v. *Gollin*, 166 F. 2d 123 (C.A. 3), certiorari denied, 333 U.S. 875.

issue whether the facts, if found, would satisfy the jurisdictional requirement. See *United States* v. *Hyde*, *supra*. Since the question whether a certain act "affects commerce" is for the court, there was no error, as petitioner claims (Pet. 18), in not instructing the jury on the meaning of "commerce" (see Pet. App. 8).

3. Petitioner contends that his privilege against compelled self-incrimination was violated when he was required to comply with a subpoena ordering him to produce financial records of the law partnership of which he was a member (Pet. 18-19). The validity of this claim turns upon the application of *Bellis* v. *United States*, 417 U.S. 85, in which this Court held the privilege against self-incrimination unavailable to a partner in a law firm which had "an established institutional identity independent of its individual partners" (417 U.S. at 95), where a subpoena sought financial records of the firm held by the partner in a representative capacity (*id.* at 97).

We agree with the court of appeals that *Bellis* controls the situation here (see Pet. App. 9-12). Although there is some variation from the factors discussed in *Bellis* (see Pet. 21-23), it is not so substantial as to preclude a finding that the law firm had an "independent identity." As the court of appeals stated (Pet. App. 9-10; footnote omitted):

> The association of Kash and Kuta was not temporary, the association having formed in 1963. Although there was no formal partnership agreement, the income of the firm, which included Kuta's aldermanic salary and expense allowance,

> was divided equally, and expenses were also shared. While each practitioner individually recorded fees received in a cash receipts journal, each had access to the journal, and custody of the journal generally depended on who made the last entry. The firm of Kash and Kuta prepared partnership tax returns from the journal. Further, the firm employed two full time secretaries who did work for both members of the firm, and another lawyer was engaged for a short duration. Additionally, one of the full time secretaries could sign "office account" checks.

Moreover, the subpoena sought financial records of the firm,[7] held by petitioner in his representative capacity. Illinois partnership law treats partners' obligations and rights with regard to a firm's financial records in the same manner as Pennsylvania law (see Pet. App. 11), which the Court considered as a significant factor in *Bellis* (417 U.S. at 98-99). These obligations and rights belie petitioner's claim (Pet. 23) of a personal interest in the records sufficient to afford Fifth Amendment protection. Thus, the court of appeals correctly concluded that "[t]he subpoena did not violate [petitioner's] privilege against self-

[7] Petitioner claims (Pet. 21) that *Bellis* is inapplicable because the district court's order included client records. But the court of appeals viewed the subpoena as requiring only the production of financial records, and there is no indication of any other type of partnership records having been produced in response to the subpoena or introduced at trial (Pet. App. 8, n. 8).

incrimination because the privilege was inapplicable" (Pet. App. 12).[8]

4. Finally, petitioner contends that several aspects of government counsel's closing argument denied him a fair trial. The court of appeals correctly held that these claims are not meritorious.

a. Petitioner claims that the prosecutor exceeded the boundaries of legitimate comment by reading selected excerpts from the trial transcript during closing argument. He contends that the reading unduly emphasized certain evidence and was in derogation of the jury's duty to be the sole determiner of the facts (Pet. 25).

Petitioner admits that he has no federal authority to support his argument. The closest analogy, however, is the reading of testimony to a jury on request, where the option lies almost exclusively in the sound discretion of the trial judge. See *United States* v. *McCoy*, 517 F.2d 41, 44 (C.A. 7); *Stone* v. *United States*, 506 F.2d 561 (C.A. 8), certiorari denied, 420 U.S. 978; *United States* v. *De Palma*, 414 F.2d 394 (C.A. 9), certiorari denied, 396 U.S. 1046. There is no more reason to establish a *per se* rule prohibiting the reading of the record in closing argument. As the court of appeals stated (Pet. App. 12-13):

> The concern for undue emphasis is even less where the reading occurs in the context of clos-

[8] Petitioner mistakenly contends that *Bellis* is inapposite also because it concerned a grand jury subpoena and the instant case involves a trial subpoena (Pet. 23). As the court of appeals noted, however (Pet. App. 12, n. 11), the "avail-

> ing arguments which review the entire evidence for the jury. Further, there is no reason to establish a *per se* rule penalizing accuracy, thereby putting a premium on counsel's memory. *See Byrnes* v. *United States*, 327 F.2d 825, 840 (9th Cir.), *cert. denied* 377 U.S. 970 (1964). Consequently, we think it is also within the discretion of the trial court whether to permit counsel to read from the trial transcript during closing argument.

Here the excerpts were short and accurately quoted (*id.* at 13). The reading was the functional equivalent of counsel's selecting from memory evidence that he wishes to emphasize, or passing documentary evidence to the jury to read during argument. The court of appeals correctly found that there was no abuse of discretion in these circumstances (*ibid.*).

b. Petitioner claims that a statement of the prosecutor concerning the truthfulness of Mr. Vanchieri's testimony was an impermissible statement of personal belief (Pet. 28, n. 16). But petitioner's argument fails when the prosecutor's statement is put in context, as the court of appeals correctly noted (Pet. App. 13):

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ability of the privilege * * * is independent of the stage to which proceedings directed at the individual have advanced." The court there cited note 8 in the *Bellis* opinion (417 U.S. at 97-98), which indicates that whether the investigative or prosecutorial focus is on the individual or the entity is immaterial in determining the individual's right to withhold the entity's records.

> Government counsel's remark was made after arguing that evidence which [petitioner] contended contradicted a prior statement made by Vanchieri was, in fact, consistent with that statement. Thus, government counsel's remark that Vanchieri's prior statement was truthful derived solely from a comparison of the evidence before the jury and therefore it did not put his credibility in issue or carry any inference of outside knowledge. *United States* v. *Carzoli*, 447 F.2d 774, 781 (7th Cir. 1971), *cert. denied*, 404 U.S. 1015 (1972).[9]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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[9] Petitioner alludes to but fails to describe other instances of error in the prosecutor's closing argument. The court of appeals rejected each of these claims, and we rely on its opinion (Pet. App. 13-14).

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